UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SEJIN PRECISION INDUSTRY CO. LTD., MTEKVISION CO., LTD., SUNGJIN TEXTILE INDUSTRY CO., LTD., SAMHWAN STEEL CO., LTD., TECHNO ELECTRONICS CO., LTD., AND IL SHIN SPINNING CO., LTD., Plaintiffs, v. CITIBANK, N.A., CITIGROUP, INC., CITIBANK OVERSEAS INVESTMENT CORPORATION, CITICORP HOLDINGS INC., AND CITIGROUP GLOBAL MARKETS INC., Defendants.	No. 16 Civ. 6910 (JSR)

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PRELIMINARY STATEMENT

Plaintiffs[1] are six Korean manufacturers and designers that entered into a series of currency trades between 2004 and March 2008, which reference the exchange rate between the Korean won ("KRW") and the U.S. dollar ("USD"). Plaintiffs refer to these as "KIKO" trades. Plaintiffs' counterparty on these trades was not any of the Defendants, but rather Defendants' Korean affiliate, Citibank Korea Inc. ("CKI"). During the Great Recession, the value of the KRW dropped as compared to the USD, and Plaintiffs complain that they lost money on these KIKO trades.

This litigation represents an untimely and improper second bite at the apple for these Plaintiffs, all of whom litigated claims arising from these same trades against CKI in Korea, and lost. Now, copying a three-year-old complaint filed by another Korean manufacturer, Simmtech Co., Ltd. ("Simmtech"), which was recently dismissed in its entirety with prejudice, *Simmtech Co. v. Citibank, N.A.*, 2016 WL 4184296 (S.D.N.Y. Aug. 3, 2016), Plaintiffs bring 102 separate claims against Defendants in the United States (but not CKI), ranging from fraud, to breach of fiduciary duty, to unjust enrichment. Every claim should be dismissed for multiple reasons, as explained below.[2]

First, the Complaint should be dismissed in its entirety because all of Plaintiffs' claims are time-barred under New York law and most are also time-barred under Korean law (which also applies under New York's borrowing statute). The longest limitations period under New York law applicable to any of Plaintiffs' claims is the later of (1) six years from the date the parties entered into the relevant KIKO contracts, or (2) two years from the date that each Plaintiff discovered or could with reasonable diligence have discovered the fraud that each alleges. Here, the last trade that forms the basis of Plaintiffs' claims was executed on March 4, 2008. But Plaintiffs did not commence this litigation until September 2016, over eight years later. The two-year discovery rule does not save Plaintiffs' claims because, for among other reasons, the key facts and alleged misrepresentations that form the basis of Plaintiffs' claims were (1) contained in Simmtech's July 2013 complaint (from which most of Plaintiffs' allegations are drawn), or (2) otherwise widely publicized by November 2013, nearly three years before the filing of this action. Most of Plaintiffs' claims are also time-barred under Korean law, which requires Plaintiffs to have brought their claims within three years of the date they became aware of their alleged claims. That limitations period ran in 2012.

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[1] The Plaintiffs are Sejin Precision Industry Co. Ltd. ("Sejin"), Mtekvision Co. Ltd. ("Mtek"), Sungjin Textile Industry Co., Ltd. ("Sungjin"), Samhwan Steel Co., Ltd. ("Samhwan"), Techno Electronics Co., Ltd. ("Techno"), and Il Shin Spinning Co., Ltd. ("Ilshin"). Defendants include Citibank, N.A. ("Citibank") and several of its domestic affiliates.

[2] Given the large number of claims, Defendants have attached as Appendix A hereto, a chart showing the grounds for dismissal for each of the 102 claims. This chart is provided for the Court's convenience and does not contain new arguments.

Second, all of Plaintiffs' claims are barred under principles of *res judicata*, collateral estoppel, and comity. Plaintiffs already litigated claims arising from the very same trades at issue here when they sued CKI in Korea. Each Plaintiff is subject to a final, non-appealable judgment in favor of CKI and adverse to Plaintiffs. Those judgments, among other things, found that CKI had not violated the Korean-law duty to explain the KIKOs to Plaintiffs and had not made unsuitable investment recommendations. Having litigated and lost in Korea, these Plaintiffs should not be allowed to proceed here.

Third, the entire Complaint should be dismissed for failure to state a claim against any of Defendants. Importantly, Plaintiffs do not allege any relationship, or even contact, between Plaintiffs and Defendants. This hole renders Plaintiffs' claims deficient. Without a relationship between Plaintiffs and Defendants, there can be no claim for breach of fiduciary duty or negligence. Similarly, the total absence of any alleged communication between Plaintiffs and Defendants is fatal to Plaintiffs' fraud claims. In an effort to avoid the consequences of these facts, Plaintiffs attempt to proceed on an agency theory of liability, arguing that Defendants are chargeable for CKI's conduct. But Plaintiffs have not alleged facts showing that CKI was acting as Defendants' agent with respect to the KIKO trades at issue in this litigation.

As explained in more detail below, the Court should dismiss all of Plaintiffs' claims with prejudice.

BACKGROUND[3]

Plaintiffs are six Korean corporations that earn revenue from exporting their goods to other countries, including the United States. (Compl. ¶¶ 10-15, 33-37, 42.) Plaintiffs receive payment for their goods in foreign currencies, including USD, and convert these payments into KRW. (*Id.* ¶¶ 42-43.) Thus, Plaintiffs are exposed to risk associated with fluctuations in the exchange rate between the KRW and these other currencies.

Between 2004 and 2008, each Plaintiff entered into a series of KIKO currency option trades with non-party CKI, Defendants' Korean affiliate. (*Id.* ¶¶ 1, 3, 631, 637, 669, 704, 786-87, 844, 852, 862, 880, 916, 944, 960.) These options referenced the exchange rate between the USD and the KRW (*id.* ¶¶ 3-4), and provided Plaintiffs with a way to hedge their exposure to the USD. These KIKO trades were negotiated in Korea, executed in Korea, and performed in Korea. (*E.g., id.* ¶¶ 619-37, 688-726, 759-87, 827-54, 876-99, 905-44, 956-61.)

In 2008, the USD appreciated in value relative to the KRW, causing Plaintiffs to experience losses on the KIKO trades. (*Id.* ¶¶ 266-70, 274-78.) As a result of those losses, starting as early as 2008, each Plaintiff ***commenced litigation in Korea against CKI***, asserting claims arising from the same KIKO transactions that are at issue here and seeking the same damages. (Exhibits 1-8 to the Declaration of Daniel B. Kaplan, dated October 7, 2016 ("Kaplan

[3] Defendants treat the Complaint's allegations as true for the purposes of this motion only.

Decl.").) CKI prevailed after trial in five of the six lawsuits, and settled the sixth lawsuit against Plaintiff Samhwan in 2014 with a complete release of liability for CKI. And all of those litigations, including the settlement with Samhwan, became subject to final, non-appealable judgments in 2014.

Plaintiffs, apparently, took no further action with respect to their alleged KIKO claims until more than two years later, when they filed this action. Plaintiffs' decision to commence this case followed a marketing trip by counsel representing another Korean manufacturer, Simmtech, which in July 2013, filed a KIKO-related complaint against the same entities that are Defendants here.[4] Plaintiffs here (represented by the same counsel that represented Simmtech) assert claims nearly identical to those asserted by Simmtech, and indeed, Plaintiffs' Complaint adopts wholesale many of Simmtech's allegations. The Honorable Katherine B. Forrest dismissed the *Simmtech* litigation with prejudice on August 3, 2016. *Simmtech*, 2016 WL 4184296, at *16.[5]

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE TIME-BARRED

A statute of limitations defense may be raised in a motion to dismiss if it appears from the face of the complaint that the claim is time-barred. *Santos v. Dist. Council of N.Y.C.*, 619 F.2d 963, 967 n.4 (2d Cir. 1980). Plaintiffs' Complaint clearly shows that all of their claims are time-barred under New York and Korean law.

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[4] Yoon Young-mi, *Opening the way for more S. Korean firms to sue in the US*, The Hankyoreh (Mar. 15, 2016), http://english.hani.co.kr/arti/english_edition/e_business/735034.html (quoting counsel as stating "[w]e will be using discovery to request all of the documents that were exchanged between Citigroup and Citigroup Korea" and that "it is possible that Citibank sold KIKO products to Korean companies while it was manipulating exchange rates").

[5] Simmtech also filed a putative class action complaint against a number of entities, including Citibank N.A. and CKI, asserting claims arising from alleged foreign exchange rate manipulations (the "Simmtech FX Action"). That action was dismissed with prejudice, and Simmtech did not appeal. *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581 (S.D.N.Y. 2015).

When a foreign plaintiff sues in New York, its claims must be timely under both New York law and the jurisdiction in which the claim accrued. *See* N.Y. C.P.L.R. § 202.[6] A plaintiff's claim for economic injury accrues in the jurisdiction where the plaintiff has its principal place of business or in which it is incorporated. *Global Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 485 (N.Y. 1999); *Verizon Directories Corp. v. Continuum Health Partners, Inc.*, 902 N.Y.S.2d 343, 343 (1st Dep't 2010). Here, Plaintiffs' claims accrued in Korea because they are Korean corporations with their principal places of business in Korea. (Compl. ¶¶ 10-15.) The chart below summarizes the claims that are time-barred under New York law or Korean law:

A. All of Plaintiffs' Claims Are Time-Barred Under New York Law

1. Negligence

Negligence claims are subject to a three-year limitations period, which begins to run on the date of injury. *Coleman & Co. Sec. v. Giaquinto Family Trust*, 236 F. Supp. 2d 288, 299, 303 (S.D.N.Y. 2002). In the contractual context, the injury occurs, and the negligence claim accrues, on the date the contract was formed, regardless of when the plaintiff incurred any alleged loss. *Id.*; *see also Pautienis v. Legacy Capital Corp.*, 828 N.Y.S.2d 336, 336 (1st Dep't 2007) (cause of action for negligence accrues no later than the date the contract is issued and not when the investment lost value). The last KIKO at issue in this litigation was entered into on March 4, 2008. (Compl. ¶ 669.) The limitations period on any negligence claims arising from these trades ended, at the latest, on March 4, 2011—over five years before Plaintiffs filed this action. Therefore, the Court should dismiss the Plaintiffs' negligence claims (Counts 5, 22, 39, 56, 73, and 90) with prejudice.

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[6] Plaintiffs affirmatively aver that New York law applies to their claims. (Compl. ¶ 2.) Defendants accept that averment for the purposes of this motion only. Defendants reserve their right to apply Korean or any other applicable law to these claims at a later stage of this action.

2. Breach of Fiduciary Duty

Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy to breach fiduciary duty are subject to a three-year limitations period because Plaintiffs primarily seek money damages. *See* N.Y. C.P.L.R. § 214(4); *Cooper v. Parsky,* 140 F.3d 433, 440-41 (2d Cir. 1998); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 272 (N.Y. 2009) (applying three-year statute of limitations where relief sought was primarily monetary and equitable relief was merely incidental). A breach of fiduciary duty claim accrues when the breach occurs. *Hughes v. JP Morgan Chase & Co.*, 2004 WL 1403337, at *3 (S.D.N.Y. June 22, 2004). The Complaint alleges that CKI breached its fiduciary duty at the time it induced Plaintiffs to enter into the KIKO trades. (Compl. ¶¶ 1099, 1327, 1551, 1773, 1998, 2221.) Thus, the limitations period for Plaintiffs' breach of fiduciary duty claims (Counts 6-8, 23-25, 40-42, 57-59, 74-76, and 91-93) ended by no later than March 4, 2011—again, over five years before Plaintiffs filed their claims.

3. Unjust Enrichment

Plaintiffs' claims for unjust enrichment are subject to a three-year limitations period because Plaintiffs primarily seek monetary damages. *Matana v. Merkin*, 957 F. Supp. 2d 473, 494 (S.D.N.Y. 2013). The statute of limitations accrues "upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered." *Id.* (citation and quotation marks omitted). Plaintiffs allege that Citibank was unjustly enriched at Plaintiffs' expense as a result of the "reverse transactions" in which CKI allegedly transferred its risk to Citibank. (Compl. ¶¶ 1116-17, 1342-43, 1566-67, 1788-89, 2013-14, 2236-37.) According to Plaintiffs, CKI transferred all profits from the KIKOs to Citibank immediately after Plaintiffs incurred losses. (*Id.* ¶ 561.) Because Plaintiffs began incurring losses no later than 2008 or 2009 (*id.* ¶¶ 685, 749, 786-87, 817, 863-64, 867, 917-27, 970-71), the limitations period on their unjust enrichment claims ended by 2012, four years before Plaintiffs filed this action.[7]

4. Fraud

All of Plaintiffs' fraud claims are grounded in fraudulent inducement theories (despite some of them being styled as "fraud in the execution").[8] Accordingly, under New York law, their fraud claims must have been brought from the later of (1) six years from the date the parties entered into the relevant KIKO contracts, or (2) two years from the date that each Plaintiff discovered or could with reasonable diligence have discovered the alleged fraud. *Prichard v. 164 Ludlow Corp.*, 854 N.Y.S.2d 53, 54 (1st Dep't 2008) (limitations period for fraudulent inducement begins to run upon execution of contract, i.e., "the act that the alleged fraudulent statements had induced"); N.Y. C.P.L.R. § 213(8). The most recent-in-time KIKO contract that is a subject of this litigation was executed on March 4, 2008. (Compl. ¶ 669.) The six-year limitations period for Plaintiffs' fraud claims thus expired, at the very latest, on March 4, 2014, more than two years before Plaintiffs commenced this action. *See also infra* at 14 n.14.

The two-year discovery rule for fraud claims does not save Plaintiffs' claims. "[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." *Gutkin v. Siegal*, 926 N.Y.S.2d 485, 486 (1st Dep't 2011) (quoting *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983)); *see Baiul v. William Morris Agency, LLC*, 2014 WL 1804526, at *9 (S.D.N.Y. May 6, 2014) (dismissing fraud claims on statute of limitations grounds because plaintiff "has not alleged any facts whatsoever that tend to show that she exercised reasonable diligence to uncover the alleged fraud until" after the expiration of limitations period). Although Plaintiffs conclusorily allege that they did not learn of Defendants' actions until March 2016 (Compl. ¶ 589)—the same month as Plaintiffs' counsel's marketing trip to Korea (*see* Preliminary Statement, *supra*)—it is clear that Plaintiffs could have discovered the facts upon which they base their alleged fraud claims many years before this action was filed.

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[7] Plaintiffs have attempted to plead independent claims for "Rescission/Disgorgement." As explained above in Section III.D.2, those are not independently actionable claims, but rather remedies for other claims. Thus, to the extent Plaintiffs' underlying claims are time-barred, they have no basis for requesting these remedies.

[8] Plaintiffs assert three broad types of fraud claims: (1) claims relating to the KIKO product itself and CKI's predictions of the KRW/USD exchange rate, which for the purposes of this motion are referred to as the "KIKO Fraud Claims" (Counts 1-4, 18-21, 35-38, 52-55, 69-72, and 86-89); (2) claims relating to the alleged failure to disclose that CKI transferred risk associated with the KIKO trades to Defendant Citibank, referred to as the "Risk Transfer Fraud Claims" (Counts 11-13, 28-30, 45-47, 62-64, 79-81, and 96-98); and (3) claims alleging that CKI did not disclose that certain Defendants allegedly manipulated the WM/Reuters Closing Spot Rates, referred to herein as the "WM/R Fraud Claims" (Counts 14-17, 31-34, 48-51, 65-68, 82-85, and 99-102).

For example, the section of the Complaint titled "Misrepresentations" lists the following general categories of alleged misrepresentations regarding the KIKOs: (1) the KIKO was described as a currency hedge but was not, in fact, a hedge (Compl. ¶¶ 280-310), (2) the KIKO was allegedly described as "zero-cost" when it was not (*id.* ¶¶ 311-36), (3) CKI told Plaintiffs that it would not profit from the KIKOs (*id.* ¶¶ 337-40), and (4) in 2007 and 2008, Defendants believed that the USD would strengthen against the KRW, while allowing CKI to represent otherwise (*id.* ¶¶ 341-43). Each of these alleged misrepresentations formed the basis of the publicly-available complaint that Simmtech filed in July 2013. (*See, e.g.*, Complaint ¶ 532, *Simmtech Co. v. Citibank, N.A.*, No. 13-cv-6768 (KBF) (S.D.N.Y.), ECF No. 1 ("at Defendants' direction, the KIKO and other instruments were falsely marketed in Korea and other countries to exporters seeking to avoid risk, including Simmtech, as 'hedges,' as suitable investments, and as 'zero-cost' risk-avoidance vehicles when in fact they were not"); *id.* ¶¶ 389, 391 ("CKI never disclosed to Simmtech that Citibank N.A. was betting against Simmtech. Indeed, CKI was actively advising Simmtech to take a position directly opposite to what Citibank N.A. would take." "At no point did CKI communicate to Simmtech that Citibank N.A. or any other Citigroup entity, could profit from Simmtech's loss."); *id.* ¶ 462 ("CKI provided these statements and reports upon the instruction of Defendants, who, like CKI, knew that the statements and reports were false. In particular, Defendants believed that the US Dollar would strengthen in value against the Korean Won in the coming three years.").)[9] Thus, the two-year "discovery" period for Plaintiffs' claims ended no later than July 2015, over a year prior to the filing of the Complaint. *See Merryman v. J.P. Morgan Chase Bank, N.A.*, 2016 WL 5477776, at *11 (S.D.N.Y. Sept. 29, 2016) (applying Arkansas law) ("Plaintiffs' allegation that they were not on notice until at least JPM's 2012 disclosure is conclusory; Plaintiffs have not alleged any type of data that was available to them when preparing this Complaint that was not available to them five or even ten years earlier.").

In reality, the two-year discovery period, to the extent applicable, ran much sooner. A plaintiff can have constructive knowledge of an alleged fraud when the plaintiff begins suffering economic losses. *Gutkin*, 926 N.Y.S.2d at 486 ("[P]laintiff had constructive knowledge of the alleged fraud . . . when he recognized that his investment returns were significantly less than expected. At that point, a reasonable investor who had lost millions of

[9] On a motion to dismiss, the Court may take judicial notice of prior lawsuits, news articles, and public filings for the purpose of determining whether Plaintiffs were on inquiry notice of their claims. *See DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 217 (3d Cir. 2007) (in granting motion to dismiss, district court properly took judicial notice of news articles published in USA Today, Time Magazine, the Wall Street Journal, and NASD press releases); *Kavowras v. New York Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003) (judicial notice may be taken of public filings); *Kramer v. Time Warner Inc.,* 937 F.2d 767, 774 (2d Cir. 1991) (courts may take judicial notice of documents filed in other lawsuits).

dollars would have investigated further.”). Here, Plaintiffs began incurring losses by no later than 2009, and accordingly, the two-year discovery period expired by no later than 2011.

Nor does the discovery rule save the WM/R Fraud Claims. Plaintiffs acknowledge that “[i]n or around late 2013,” prosecutors and regulators throughout the world “began investigations into Citigroup, Citibank N.A., and several other of the world’s largest banks as to whether they manipulated foreign exchange rates.” (Compl. ¶ 594.) The alleged manipulation and the resulting investigations were widely publicized in news articles and public filings beginning in 2013.[10] Indeed, on November 8, 2013, Simmtech, represented by the same counsel that represents Plaintiffs here, filed the Simmtech FX Action in this Court asserting claims arising out of the alleged manipulation of the WM/Reuters rates that forms the basis of Plaintiffs’ WM/R Fraud Claims here. (Class Action Complaint, *Simmtech Co. v. Barclays Bank PLC, et al.*, No. 13 Civ. 7953 (LGS) (S.D.N.Y. Nov. 8, 2013); Kaplan Decl. Ex. 10.) This lawsuit was widely reported in the Korean press in November 2013.[11] Thus, by no later than November 2013, Plaintiffs were on inquiry notice regarding the alleged facts that form the basis of their WM/R Fraud Claims, and the discovery period for these claims ran in November 2015,

[10] *See, e.g.*, Liam Vaughan et al., *Traders Said to Rig Currency Rates to Profit Off Clients*, Bloomberg (June 11, 2013), http://www.bloomberg.com/news/articles/2013-06-11/traders-said-to-rig-currency-rates-to-profit-off-clients; Daniel Schafer et al., *Foreign exchange: The big fix*, Fin. Times (Nov. 12, 2013) (Kaplan Decl. Ex. 9); Liam Vaughn & Gavin Finch, *HSBC Citigroup Said to Suspend Traders on Currency Probe*, Bloomberg (Jan. 17, 2014), http://www.bloomberg.com/news/articles/2014-01-17/hsbc-says-it-suspended-two-london-foreign-exchange-traders-1-; Citigroup Inc., Annual Report (Form 10-K) at 318 (Mar. 3, 2014).

[11] *See, e.g.*, Na Jeong-ju, *Korean firm sues global banks*, The Korea Times (Nov. 18, 2013), http://www.koreatimes.co.kr/www/news/biz/2016/09/488_146463.html; Kim Yon-se, *Korean firms sue IBs in U.S. over FX rigging*, The Korea Herald (Nov. 18, 2013), http://www.koreaherald.com/view.php?ud=20131118000873; Hyun Jin Park, *“Significant Losses Incurred Due to Currency Exchange Manipulation by Global Financial Institutions” – A Class Action Suit Brought in the United States by a Korean Company*, Dong-A Ilbo (Nov. 19, 2013), http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=104&oid=020&aid=0002494957.

nearly a year before Plaintiffs brought this action. *See Aozora Bank, Ltd. v. Deutsche Bank Sec.*, 29 N.Y.S.3d 10, 14 (1st Dep't 2016) ("public reports and lawsuits of alleged fraud are sufficient to put a plaintiff on inquiry notice of fraud"); *CIFG Assurance N. Am., Inc. v. Credit Suisse Sec. (USA) LLC*, 11 N.Y.S.3d 563, 564 (1st Dep't 2015) (imputing knowledge of alleged fraud to plaintiff due to other lawsuits commenced prior to expiration of limitations period).

5. Plaintiffs Have Not Adequately Alleged Equitable Estoppel

Plaintiffs attempt to evade the applicable statutes of limitation by alleging that Defendants engaged in "fraudulent concealment of their misconduct to prevent Plaintiffs from suing them for the activities alleged in this Complaint," and seeking to equitably estop Defendants from asserting that Plaintiffs' claims are time-barred. (Compl. ¶ 592.) Equitable estoppel is an extraordinary remedy that "should be 'invoked sparingly and only under exceptional circumstances.'" *Twersky v. Yeshiva Univ.*, 993 F. Supp. 2d 429, 442 (S.D.N.Y. 2014), *aff'd*, 579 F. App'x 7 (2d Cir. 2014). To assert equitable estoppel, a plaintiff must allege that it was prevented from timely filing an action due to its "reasonable reliance on deception, fraud or misrepresentations by the defendant[s]." *Putter v. N. Shore Univ. Hosp.*, 858 N.E.2d 1140, 1142 (N.Y. 2006). "Such fraud, misrepresentations, or deception must be ***affirmative and specifically directed at preventing the plaintiff from bringing suit***; failure to disclose the basis for potential claims is not enough, nor are broad misstatements to the community at large." *Twersky*, 993 F. Supp. 2d at 442 (emphasis added). Accordingly, the purported acts forming the basis for equitable estoppel must be separate and apart from the conduct supporting a plaintiff's underlying claims, including any fraud-based claims, *see Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 265 (S.D.N.Y. 2006); *Zumpano v. Quinn*, 849 N.E.2d 926, 929 (N.Y. 2006), and must be pleaded with particularity. Fed. R. Civ. P. 9(b); *see also Fezzani v. Bear, Stearns & Co.*, 2005 WL 500377, at *8 (S.D.N.Y. Mar. 2, 2005).

The Complaint's conclusory allegations of "fraudulent concealment" are entirely devoid of specific facts and do not satisfy Plaintiffs' burden of demonstrating that Defendants should be equitably estopped from asserting the statute of limitations. The Complaint makes the conclusory allegation that Defendants took "active steps, including fraudulent concealment of their misconduct to prevent Plaintiffs from suing them for the activities alleged" (Compl. ¶ 592), but Plaintiffs do not identify these "active steps." Rather, Plaintiffs aver that "[b]y its very nature, the unlawful activity, as alleged [in the Complaint], was self-concealing" and that "Defendants engaged in secret and surreptitious activities, especially but not limited to the reverse transactions, in order to defraud Plaintiffs." (Compl. ¶ 583.) But the allegedly self-concealing nature of Defendants' purported actions does not give rise to equitable estoppel. *See Twersky*, 993 F. Supp. 2d at 444-45; *Zumpano*, 849 N.E.2d at 929; *Abercrombie*, 438 F. Supp. 2d at 265. "[O]therwise, the mere assertion of an underlying fraudulent act would always trigger equitable estoppel and render the discovery accrual rule for fraud actions superfluous." *Abercrombie*, 438 F. Supp. 2d at 266.

Plaintiffs also conclusorily allege that Defendants "fraudulently concealed" their actions by "engaging in secret communications between and amongst themselves" and by "agree[ing] among themselves not to discuss publicly or otherwise reveal the nature and substance of the acts and communications in furtherance of the agreements alleged [in the Complaint]." (Compl. ¶¶ 584-85.) But it is not enough for Plaintiffs to allege that the Defendants were aware of their alleged wrongdoing and remained silent about it. *Zumpano*, 849 N.E.2d at 929. An alleged "wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations." *Id.* at

930. Moreover, Plaintiffs have not pleaded these allegations with any particularity.[12]

There is nothing inequitable about dismissing Plaintiffs' claims. Plaintiffs have been aware of them for years, commenced and lost largely duplicative lawsuits in Korea, watched as other plaintiffs brought suit in Korea and the U.S., and sat on their rights for years.

B. All But One Category of Plaintiffs' Tort Claims Are Time-Barred Under Korean Law[13]

Article 766 of the Korean Civil Code sets the limitations period for Korean tort claims. (Declaration of Don-Hui Lee, dated October 5, 2016 ("Lee Decl.") ¶ 9.) Article 766 provides that a claim for tort damages is time-barred unless it is made within the ***earlier*** of (i) three years from the date when the plaintiff became aware of (a) the identity of the tortfeasor, and (b) his or her damages (the "Short-Term Statute of Limitations"), or (ii) ten years from the occurrence of the tortious act. (*Id.*)

With respect to the "identity of the tortfeasor" prong, all of Plaintiffs' tort claims are based upon the alleged actions or omissions by CKI and/or its employees, and Plaintiffs have been aware of their identities since they entered into the first KIKOs in 2004 through 2007. (Compl. ¶¶ 633, 704, 773, 844, 880, 944-45.) In fact, Plaintiffs' claims are premised on the notion that they believed they were doing business with Citigroup, the global enterprise, and not just CKI. (Compl. ¶ 9 ("Defendants, directly and through CKI, and acting under the color of the Citi global reputation, marketed and sold KIKOs to Plaintiffs . . . .").) Moreover, Plaintiffs' allegations that CKI provided them with research and marketing materials prepared by the ***Defendants***, if accepted as true at this stage, means that Plaintiffs would have been aware of any role allegedly played by Defendants in the KIKO transactions when Plaintiffs entered into those transactions beginning in 2004. (*Id.* ¶¶ 363, 384, 444-48, 450, 481, 566); *see Simmtech*, 2016 WL 4184296, at *11. Plaintiffs, therefore, knew the identity of the alleged tortfeasors well over three years before they brought suit in 2016.[14]

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[12] These same allegations were contained in Simmtech's complaint. The *Simmtech* court concluded that Simmtech had "not sufficiently demonstrated that the statute of limitations for [Simmtech's] claims are tolled for equitable estoppel." *Simmtech*, 2016 WL 4184296, at *12.

[13] The only category of tort claims not barred by the relevant Korean limitations periods are the WM/R Fraud Claims, which are not actionable for the other grounds discussed herein.

With respect to the second prong—awareness of damages—Plaintiffs have pleaded that they knew of their alleged damages by no later than 2008 or 2009, when they allegedly began incurring losses on certain of their trades. (Compl. ¶¶ 685, 749-50, 867, 917, 954.) Plaintiffs also affirmatively allege that in early 2009, CKI sent them "Korean-language disclosures" that "used the word 'risk' more frequently, and expressed more prominently the chance that the client could lose the entire amount the client agreed to put up in the contract." (*Id.* ¶ 582.) Thus, Plaintiffs were on notice of their claims by no later than 2009 but did not bring their claims against Defendants until September 2016, four years after the Short-Term Statute of Limitations expired. Therefore, under Korean law, all of Plaintiffs' tort claims, except the WM/R Fraud Claims, are untimely.[15]

Finally, any claims arising from alleged misrepresentations or omissions that are alleged to have occurred before September 2, 2006, are not actionable under the second portion

[14] Under Korean law, even if a party does not actually know the identity of the alleged tortfeasor, that party is still deemed to have been aware of the alleged tortfeasor's identity if "there was enough information available to a plaintiff to deem them to have been aware of the tort." (Lee Decl. ¶ 11.) Here, Plaintiffs allege that they learned of "the facts needed to commence suit against Defendants for the misconduct alleged . . . through information learned in the course of an investigation conducted by a plaintiff in a related case" (Compl. ¶ 589), a reference to the *Simmtech* case. Although Plaintiffs allege that they did not achieve this awareness until March 2016, it is undisputed that no discovery took place in the *Simmtech* case, and that the *Simmtech* case was commenced in July 2013—more than three years earlier than the date this Complaint was filed. Therefore any information necessary to assert these claims was available to Plaintiffs by July 2013, at the latest.

[15] Nevertheless, the WM/R Fraud Claims should be dismissed as untimely under New York law, under the doctrines of comity, *res judicata*, and collateral estoppel because Plaintiffs' allegations supporting those claims do not state a claim.

of the Korean statute of limitations, which bars any claims asserted more than ten years from the occurrence of the tortious act. (Lee Decl. ¶ 9.)

C. Plaintiffs' Unjust Enrichment Claims Are Time-Barred Under Korean Law

Under Korean law, before a party can assert a claim for unjust enrichment arising from a fraudulently induced contract, the allegedly defrauded party must first seek rescission of the contract. (Lee Decl. ¶ 13.) This must be done within three years of the date that the plaintiff becomes aware of the grounds for rescission (*id.*), which in this case would have been the allegedly fraudulent activity of CKI. (*Id.*) For the same reasons discussed above in Section I.B, Plaintiffs were aware of any such conduct by no later than 2009, but Plaintiffs did not seek rescission of the KIKOs in this Court until they filed the Complaint in September 2016, four years too late.[16] Any claims for unjust enrichment are barred by the Korean limitations period. *See Simmtech*, 2016 WL 4184296, at *12.

II. ALL OF PLAINTIFFS' CLAIMS ARE BARRED BY THE DOCTRINES OF COMITY, *RES JUDICATA*, AND COLLATERAL ESTOPPEL

Between November 2008 and November 2013,[17] each Plaintiff commenced litigation in Korea against CKI arising from the same KIKO trades that are at issue in this case, asserting claims for alleged breach of a duty to explain the KIKOs to Plaintiffs and violations of suitability principles. (Kaplan Decl. Exs. 1-8.) As set forth below, CKI prevailed in each litigation, and each litigation has ended in a final, non-appealable judgment. Specifically, the Korean courts found the following with respect to each Plaintiff:

- Sejin – final judgment in favor of CKI on December 19, 2014. The Seoul Central District Court (i.e., the Korean trial court) dismissed all of Sejin's claims against CKI,

[16] All Plaintiffs, except Sejin, sought rescission in the Korean actions but those claims were all rejected. (Kaplan Decl. Exs. 1-8.)

[17] Plaintiffs filed their Korean litigations on the following dates: Sejin (November 1, 2013); Mtek (October 29, 2011); Sungjin (April 14. 2009); Samhwan (February 6, 2009); Techno (November 3, 2008); and Ilshin (April 28, 2009).

including breach of the duty to explain and violation of the principles of suitability. (*Id.* Ex. 1 at 6.) It found that CKI adequately explained the KIKOs to Sejin because Sejin, in executing the KIKO contracts, acknowledged being informed of the possible transaction risks and its acceptance of those risks. (*Id.* at 11-12.) CKI did not violate the principles of suitability because the KIKOs did not cause Sejin to be over hedged at the time of the contract execution. (*Id.* at 10-11.)

- Mtek – final judgment in favor of CKI on November 28, 2014. The Supreme Court of Korea quashed the original court's judgment in favor of Mtek and remanded the case to the Seoul High Court (i.e., the Korean intermediate appellate court). (*Id.* Ex. 2 at 8.) On remand, the Seoul High Court held that CKI did not violate the principles of suitability or breach the duty to explain the KIKOs, noting that Mtek, "received a sufficient amount of explanation regarding the details of the contract from the defendant [*i.e.*, CKI]" and that "it is safe to say Mtek [ ] was well aware of the structure and risks of the currency option contract of this case," with Mtek's executive-in-charge signing an acknowledgement of the risks associated with the KIKOs. (*Id.* Ex. 3 at 6, 9.) The Seoul High Court also held that, "it is difficult to say that [CKI] aggressively recommended an excessively risky contract considering Mtek's [ ] business situations by entering into the [KIKO], it is unreasonable to claim th[at] [CKI] violated the suitability principle." (*Id.* at 7.)

- Sungjin – final judgment in favor of CKI on April 30, 2014. The Supreme Court of Korea upheld the decision of the original court in favor of CKI finding that it did not breach the duty to explain or violate the principles of suitability with respect to the KIKOs. (*Id.* Ex. 4 at 4-5.) The court reasoned that prior to signing the contract, CKI actually advised "Plaintiff Sungjin[] against signing the contract citing the possibility of exchange rate increase…and the risk of a 3-year duration . . . ." (*Id.* at 4.) Similarly the court found that CKI met its duty to explain and refused to impose extraordinary obligations on CKI stating, "Defendant is not obliged to explain the risks assuming the worst case scenario of skyrocketing exchange rate beyond explaining basic profit and loss structure subject to volatility of exchange rate . . . ." (*Id.* at 5.)

- Samhwan – final judgment in favor of CKI on July 2, 2014. The Supreme Court of Korea rejected the portion of the Seoul High Court's decision finding in favor of Samhwan with respect to CKI's violation of the principles of suitability. (*Id.* Ex. 5 at 4.) It also found that the Samhwan representative gave false information to CKI that impacted the evaluation of the adequacy of the KIKO contract amount. (*Id.* at 7.) The court also found that CKI did not breach the duty to explain the KIKOs. (*Id.* at 11.)

- Techno – final judgment in favor of CKI on July 29, 2014. The Seoul High Court found that Techno's claim that CKI breached its duty to explain the KIKO transactions was "unreasonable" (*id.* Ex. 6 at 23), and that CKI was not obligated to explain that the KIKOs could result in "unlimited losses" in the event of an increasing exchange rate, because Techno could have predicted this outcome itself based on the KIKOs' structure, which its CEO actively negotiated. (*Id.* at 22.) Techno appealed the decision to the Supreme Court of Korea, which denied the appeal in its entirety as "groundless." (*Id.* Ex. 7 at 2.)

- Ilshin – final judgment in favor of CKI on January 23, 2014. The Supreme Court of Korea upheld the dismissal of all of Ilshin's claims. (*Id.* Ex. 8 at 2, 6.) The court held that the KIKOs were not unsuitable because the terms and conditions were not unreasonable nor "excessively lengthy." (*Id.* at 5.) CKI did not breach the duty to explain because it explained the nature, main points, and risks of the KIKOs to Ilshin. (*Id.* at 5.)

Principles of comity govern the recognition and enforcement of foreign judgments like the ones discussed above. *See Victrix Steamship Co., v. Salen Dry Cargo, A.B.*, 825 F. 2d 709, 713 (2d Cir. 1987) (citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). "Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy." *Id.* The Korean courts plainly had jurisdiction of these Korean claims between Korean parties, and enforcement of the Korean court decisions will not prejudice the rights of any United States citizens or violate domestic public policy. There can be no concern here where it was Plaintiffs who chose to sue initially in the Korean courts. Thus, the Court should grant recognition of the Korean courts' judgments as a matter of comity.

Res judicata bars claims brought in a subsequent proceeding if "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. N.Y. City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000). Under the applicable "transactional approach" to *res judicata*, a valid and final judgment on the merits of a case extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Duane Reade Inc. v. St. Paul Fire and Marine Ins. Co.*, 600 F.3d 190, 195-96 (2d Cir. 2010); *Simmtech*, 2016 WL 4184296, at *8 ("Because defendant Citigroup Overseas Investment Corporation is a federally-chartered Edge Act Corporation and the transaction at issue is of an international nature, there is federal jurisdiction over this case and this Court applies federal *res judicata* and collateral estoppel rules."); *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32 (D.D.C. 2007). Indeed, once a final judgment is rendered on a claim, *res judicata* "bars cases that arise from the same operative nucleus of fact," no matter if the legal theories of recovery are different. *Cameron v. Church*, 253 F. Supp. 2d 611, 619 (S.D.N.Y. 2003) (citation and quotation marks omitted).

The Korean decisions were adjudications on the merits of Plaintiffs' KIKO-related claims, they involved these Plaintiffs, and Plaintiffs' claims could have been asserted in the Korean litigations. Indeed, Plaintiffs allege that their claims "aris[e] out of a series of transactions between, the [Plaintiffs] . . . and Citibank Korea Inc." (Compl. ¶ 1), making clear that their claims here all arise from the same nucleus of operative facts as did their claims against CKI in Korea—the sale, performance, and effect of the KIKO contracts.[18]

Moreover, the doctrine of collateral estoppel, or issue preclusion, bars Plaintiffs from re-litigating the issues decided against them in Korea. Collateral estoppel requires that: "(1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits." *Cameron*, 253 F. Supp. 2d at 618.[19] All of these requirements are met here. The Korean litigations all resulted in

[18] To the extent the Court might require that the defendants in both actions be the same parties or their privies, Defendants are in privity with CKI for *res judicata* purposes since they are affiliates of CKI and their interests were adequately represented in the Korean action. *See, e.g., Simmtech*, 2016 WL 4184296, at *9; *Farber v. Goldman Sachs Grp., Inc.*, 2011 WL 666396, at *5 (S.D.N.Y. Feb. 16, 2011).

[19] The same defendants need not be present in both actions for collateral estoppel to apply to a plaintiff. *See Austin v. Downs, Rachlin & Martin*, 114 F. App'x 21, 22 (2d Cir. 2004).

judgments against Plaintiffs in favor of CKI, finding that CKI did not violate suitability principles or breach the duty to explain the KIKO transactions to Plaintiffs. (Kaplan Decl. Exs. 1-8.) All of Plaintiffs' claims must fail because they are based on these issues, which cannot be re-litigated in this Court. For example, Plaintiffs' negligence claims are based on certain purported misstatements made by CKI and CKI's alleged failure to explain the KIKOs to Plaintiffs. But the Korean courts specifically held that CKI adequately explained the KIKOs to Plaintiffs. (*Id.* Exs. 1-8.)

Furthermore, Plaintiffs' fiduciary duty claims are premised on purported "false and misleading" information that Plaintiffs allege was provided to them. But, again, the Korean courts found that CKI provided adequate information to Plaintiffs sufficient to inform their decisions to enter the KIKO transactions. (Kaplan Decl. Exs. 1-8.) For the same reason, Plaintiffs' KIKO Fraud Claims and Risk Transfer Fraud Claims, all of which require a showing that CKI made false or misleading statements, must fail. Moreover, Plaintiffs' unjust enrichment claims require a finding of inequitable conduct. Given the Korean courts' findings that Plaintiffs' claims against CKI were, *inter alia*, "unreasonable" and "groundless" (*see, e.g.*, Kaplan Decl. Ex. 7 at 2), there can be no finding of inequitable conduct here.[20]

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF

To state a claim for relief a complaint must allege facts that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must, in other words, contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The

[20] The application of *res judicata* and collateral estoppel here is consistent with the trend to restrict access to federal courts for alleged wrongs committed primarily outside of the U.S.—even in the face of allegations that deceptive conduct occurred, and misrepresentations were made, in the U.S. *See, e.g., Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010).

court must determine whether the well-pleaded, non-conclusory allegations show that defendants' liability is more than a "sheer possibility," but that such liability is plausible. *Id.* Allegations that are nothing more than "legal conclusions" or "naked assertions" are given no weight. *Id.* A complaint that does not meet these standards—like the entire Complaint here—should be dismissed. *Id.*

In addition, Rule 8(a)(2) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Plaintiffs' Complaint is neither short—running 266 pages and 2,320 paragraphs and containing 102 separate claims for relief—nor plain—containing extraneous allegations not related to any of Plaintiffs' claims and lacking an intelligible structure. The Court should dismiss the Complaint without prejudice on this ground alone, and require Plaintiffs to submit a complaint that complies with the rule.[21] *See, e.g.*, *In re Am. Realty Capital Prop., Inc. Litig.*, 2015 WL 6869337, at *1 (S.D.N.Y. Nov. 6, 2015) (dismissing complaint for failure to satisfy Rule 8(a)(2)); *In re Genworth Fin., Inc. Sec. Litig.*, 2015 WL 1402080, at *1 (S.D.N.Y. Mar. 25, 2015) (same); *UPS Store, Inc. v. Hagan*, 99 F. Supp. 3d 426, 432 (S.D.N.Y. 2015).

A. The Court Should Dismiss the Plaintiffs' Fiduciary Duty Claims[22]

1. Plaintiffs Do Not Plead Facts Showing That CKI or Defendants Were Their Fiduciaries

Where no fiduciary relationship exists, no claim for a breach of fiduciary duty can

[21] Plaintiffs to try to make up for their lack of substantive allegations through sheer volume of conclusory allegations. That is not a sufficient pleading technique.

[22] This refers to Plaintiffs' claims for: Breach of Fiduciary Duty (Counts 6, 23, 40, 57, 74, 91); Conspiracy to Breach Fiduciary Duty (Counts 7, 24, 41, 58, 75, 92); and Aiding and Abetting Breach of Fiduciary Duty (Counts 8, 25, 42, 59, 93). Each of these claims requires Plaintiffs to plead the existence of an underlying fiduciary duty running from CKI to Plaintiffs. *Eaves v. Designs for Fin., Inc.*, 785 F. Supp. 2d 229, 257 (S.D.N.Y. 2011) (conspiracy); *Sharp Int'l Corp. v. State St. Bank & Trust Co. (In re Sharp Int'l Corp.)*, 403 F.3d 43, 49-50 (2d Cir. 2005) (aiding and abetting); *N. Shipping Funds I, LLC v. Icon Capital Corp.*, 921 F. Supp. 2d 94, 101 (S.D.N.Y. 2013) (breach of fiduciary duty).

lie. *N. Shipping Funds I, LLC v. Icon Capital Corp.*, 921 F. Supp. 2d 94, 101 (S.D.N.Y. 2013). "A fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Roni LLC v. Arfa*, 963 N.E.2d 123, 123 (N.Y. 2011). Here, Plaintiffs do not allege that any Defendant owed a fiduciary duty directly to any Plaintiff. Rather, Plaintiffs allege that CKI was their fiduciary and that CKI acted as Defendants' agent with respect to the KIKO transactions. (*See, e.g.*, Compl. ¶¶ 352, 360, 616.) This theory is contradicted by Plaintiffs' acknowledgment that CKI held the other side of each trade, meaning that Plaintiffs' losses on any trade would be CKI's gains (and vice versa). Where economic interests are adverse, no fiduciary relationship exists. *Simmtech*, 2016 WL 4184296, at *15 (because CKI held the other side of trades from the plaintiff, it was "mathematically impossible" for CKI and the plaintiff to have had common interests such that CKI was "acting for the benefit of" the plaintiff) (internal citations and quotations omitted).

Moreover, absent extraordinary circumstances, parties dealing at arm's length in a commercial transaction do not owe each other a fiduciary duty. *Boccardi Capital Sys., Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.*, 355 F. App'x 516, 519 (2d Cir. 2009). Plaintiffs have not pleaded any facts showing why the KIKO trades were anything more than ordinary, arm's length commercial transactions. And, contrary to Plaintiffs' assertions that Defendants were their fiduciaries by virtue of CKI's provision of financial advice related to future exchange rates (Compl. ¶¶ 1091, 1319, 1543, 1765, 1990, 2212), the mere provision of economic forecasts and opinions concerning the currency markets is insufficient to show that a party "'agreed to act for or give advice for the benefit of'" another. *Simmtech*, 2016 WL 4184296, at *15 (quoting

Boccardi, 355 F. App'x at 519).[23]

2. Plaintiffs Disclaimed Any Fiduciary Relationship With CKI

Plaintiffs base all of their fiduciary duty claims on certain KIKO contracts entered into with CKI. Plaintiffs, however, chose not to attach any of these documents to their Complaint and, in fact, obfuscate as to which contracts govern their KIKO trades, sometimes stating that the "FX Options" contracts govern, and sometimes using a more generic term. (*See, e.g.*, Compl. ¶¶ 636-37, 702, 780, 789, 842, 909, 944.) Despite Plaintiffs' refusal to include the documents that form the very basis of their claims, it is clear that for every KIKO trade alleged in the Complaint, each Plaintiff was party to an "FX Options" contract with CKI.[24] Each of these FX Options contracts contains a straightforward disclaimer stating, in relevant part, that CKI did not "act as [a Plaintiff's] consultant or agent" with respect to the trades and that each Plaintiff "should make an independent decision as to whether you could bear the risks by evaluating the economic risks and values of this trade, as well as the legal, tax and accounting characteristics and results of this trade, without relying on our company or our company's affiliates." (Kaplan Decl. Ex. 11 at 3.) Courts routinely enforce similar disclaimers in finding that no fiduciary duty exists. *See BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 866 F. Supp. 2d 257, 269 (S.D.N.Y. 2012); *Simmtech*, 2016 WL 4184296, at *15.

3. Plaintiffs' Conspiracy to Breach Fiduciary Duty Claims[25] Fail for Additional Reasons

Under New York law, "to sustain an allegation of civil conspiracy that involves a

[23] Plaintiffs' fiduciary duty claims should also be dismissed because they are duplicative of Plaintiffs' fraud claims. They rely on the same alleged acts and seek the same damages and relief. *Popal v. Slovis*, 2015 WL 10687614, at *6 (S.D.N.Y. Apr. 28, 2015).

[24] While some of the FX Options contracts contain the signature or company seal of the relevant Plaintiff and others do not, Defendants understand that the parties did not dispute the contents of the contracts or the fact of their execution in the Korean litigations (in which these FX Options contracts were produced).

[25] Counts 7, 24, 41, 58, 75, and 92.

conspiracy to breach a fiduciary duty, ***all members of the alleged conspiracy must independently owe a fiduciary duty to the plaintiff***." *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 611 (S.D.N.Y. 2011) (emphasis added); *Natural Organics, Inc. v. Smith*, 2006 WL 2042489, at *2 (Sup. Ct. Nassau Cty. May 24, 2006) ("Clearly Nature's Way does not have a fiduciary duty to plaintiff and thus cannot commit conspiracy to breach same."). There are no facts alleged in the 2,320-paragraph Complaint showing that any Defendant owed a fiduciary duty to any of the Plaintiffs. Rather, Plaintiffs' Complaint asserts a legal theory: that as "foreseeable victims" of CKI's alleged breach of fiduciary duty, "Defendants owed an independent duty to [Plaintiffs] to prevent it." (Compl. ¶¶ 1107, 1333, 1557, 1779, 2004, 2227.) Defendants are aware of no authority supporting such a conclusion.

In addition, to successfully plead a conspiracy, a plaintiff must allege "specific time(s), place(s), or person(s) involved in the alleged conspiracies." *Am. Med. Ass'n v. United Healthcare Corp.*, 588 F. Supp. 2d 432, 446 (S.D.N.Y. 2008) (citing *Twombly*, 550 U.S. at 565 n.10). The Complaint is devoid of specific allegations regarding the conduct of any employee or agent of Defendants. The general allegations in the Complaint about certain Defendants' interests in marketing KIKOs in Korea (and other jurisdictions) are insufficient, as it "is well established that solely pleading opportunities to conspire is not sufficient to support a claim of actual conspiracy." *Id.*

4. The Aiding and Abetting Breach of Fiduciary Duty Claims[26] Also Fail

To establish a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must show, in addition to the existence of a fiduciary duty between the plaintiff and another party, (1) that the defendant had ***actual knowledge*** of the breach of that duty, (2) that the defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered

[26] Counts 8, 25, 42, 59, 76, and 93.

damage as a result of the breach. *In re Sharp Int'l Corp.*, 403 F.3d at 49-50.

Plaintiffs' Complaint contains conclusory allegations of awareness, e.g., Defendants "were aware that [Plaintiffs] w[ere] planning to enter into" the KIKOs. (Compl. ¶¶ 1132, 1358, 1582, 1804, 2029, 2252; *see also id.* ¶¶ 1188, 1414, 1638, 1860, 2085, 2308.) But the Complaint contains no specific facts to support these conclusory statements. For example, there are no facts showing that any Defendants had actual knowledge of the alleged breaches of fiduciary duty by, or alleged activities of, CKI with respect to Plaintiffs. Indeed, the Complaint devotes 355 paragraphs to alleging how each of the Plaintiffs was introduced to and entered into the KIKOs. (*Id.* ¶¶ 619-973.) Nowhere in these 355 paragraphs do Plaintiffs allege that any of the Defendants communicated with any of the Plaintiffs or that Defendants were aware that CKI was communicating with Plaintiffs about potential options trades.

The only other allegation contained in this 355-paragraph section relates to Defendants' general belief that the USD would strengthen against the KRW. (*Id.* ¶¶ 666-68, 682, 815.) This allegation concerning Defendants' purported belief about the general strength of the USD does not satisfy the requirement of pleading "actual knowledge" with respect to the alleged breach by CKI of a duty it owed to its customer. *Global Minerals & Metals Corp. v. Holme*, 824 N.Y.S.2d 210, 217 (1st Dep't 2006).

B. Plaintiffs' Negligence Claims[27] Should Be Dismissed

It is black-letter law that there can be no claim for negligence unless there is a duty of care running from a defendant to the plaintiff. *Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 215 (2d Cir. 2002). Plaintiffs allege no facts showing any duty of care running from Defendants to any Plaintiff. Rather, the Complaint alleges that Plaintiffs entered into a series of commercial transactions with CKI to which Defendants are not parties. (*See, e.g.*,

[27] Counts 5, 22, 39, 56, 73, and 90.

Compl. ¶¶ 1, 3, 118.) Thus, there is no relationship between Plaintiffs and Defendants upon which a duty may be based. *DeBlasio v. Merrill Lynch & Co.*, 2009 WL 2242605, at *35 (S.D.N.Y. July 27, 2009) (dismissing negligence claim that sought to impose "multiple layers of duties" on defendant and noting that promotional documents and advertisements do not give rise to a heightened duty of care); *Quinn v. Thomas H. Lee Co.*, 61 F. Supp. 2d 13, 20 (S.D.N.Y. 1999) (granting summary judgment on a negligence claim asserted against the shareholders and parent of the alleged tortfeasor because, like here, no defendant "ever entered into any contract with plaintiff or formed any other business relationship with plaintiff"), *aff'd sub nom. Quinn v. Teti*, 234 F.3d 1262 (2d Cir. 2000). The transactions between Plaintiffs and CKI are not even sufficient to impose a duty of care on CKI, let alone Defendants, because "[w]here the only duty owed to the plaintiff arises from a valid contract, a negligence claim does not lie." *Banco Indus. de Venezuela, C.A. v. CDW Direct, L.L.C.*, 888 F. Supp. 2d 508, 512 (S.D.N.Y. 2012).

C. Plaintiffs' Fraud Claims Are Insufficiently Pleaded

To state a claim for fraud under New York law a plaintiff must allege, (1) a representation of material fact, (2) that the representation was false, (3) knowledge by the party making the representation that it was false when made, (4) justifiable reliance by the plaintiffs, and (5) resulting injury. *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 291 (2d Cir. 2006) (quoting *Kaufman v. Cohen*, 760 N.Y.S.2d 157, 165 (1st Dep't 2003)). Under Rule 9(b), a plaintiff must "state with particularity the circumstances constituting fraud or mistake." To comply, a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004).

1. Plaintiffs' KIKO Fraud Claims Are Deficient

a. The KIKO Fraud Claims Fail Because Plaintiffs Do Not Adequately Plead a Fraudulent Statement

There can be no fraud where there is no allegation of a fraudulent statement. *See Bombardier Capital, Inc. v. Naske Air GmbH*, 2003 WL 22137989, at *3-4 (S.D.N.Y. Sept. 17, 2003) (dismissing fraudulent inducement claim for failure to identify allegedly fraudulent statements); *Kamdem-Ouaffo v. Pepsico, Inc.*, 160 F. Supp. 3d 553, 567 (S.D.N.Y. 2016), *aff'd*, 2016 WL 4151245 (Fed. Cir. Aug. 5, 2016) (claim for fraud in the execution must meet Rule 9(b) heightened pleading standard). Here, Plaintiffs' Complaint ***does not contain a single alleged statement*** made by any Defendant to any of the six Plaintiffs. Rather, the Complaint alleges that it was CKI that made the purported misrepresentations to the six Plaintiffs. According to Plaintiffs: "All of ***CKI's*** communications to Plaintiffs that the KIKO products were 'hedges' were completely false," "***CKI*** [falsely] told Plaintiffs that the net cost of these [KIKO] premiums would be zero," "***CKI*** [falsely] told some Plaintiffs that the KIKO was a government-sponsored product," and "***CKI*** repeatedly emphasized that the Dollar was falling against the Won and was expected to continue to fall, and that the KIKO was a suitable product at hedging against this likelihood." (Compl. ¶¶ 90, 280, 313, 339 (emphasis added).) But these alleged statements of ***CKI*** are not enough to satisfy the Plaintiffs' pleading burden to assert fraud claims against the ***Defendants***. Plaintiffs "may not lump separate defendants together in vague and collective fraud allegations but must inform each defendant of the nature of his alleged participation in the fraud." *Eaves*, 785 F. Supp. 2d at 247. Plaintiffs fail to do even that, and instead "lump" Defendants in with non-party CKI.

b. Plaintiffs Have Failed To Plead That They Reasonably Relied On Any Alleged Fraudulent Statement (Regardless of the Speaker) or That Such Reliance Resulted In The Claimed Loss

Reasonable reliance upon an allegedly fraudulent statement is a required element of a fraud claim. *See Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp.*, 343 F.3d 189, 195 (2d Cir. 2003). Although Plaintiffs allege dozens of fraud claims, all of them, in some form or another, stem from Plaintiffs' core allegation that they believed CKI could accurately predict the future KRW/USD exchange rates. (*See, e.g.*, Compl. ¶¶ 629, 661, 664, 681, 696, 718, 726, 760, 767, 770, 838, 858, 898-99, 958.) Plaintiffs allege that they incurred losses on the KIKOs because these predictions did not come true. (*Id.* ¶¶ 655, 750, 817, 865-67, 917, 970.) But an opinion or prediction as to a future event cannot form the basis of a fraud claim, *Hampshire Equity Partners II, L.P. v. Teradyne, Inc.*, 2005 WL 736217, at *4 n.4 (S.D.N.Y. Mar. 30, 2005), in part because reliance on such a prediction is patently unreasonable. *Simmtech*, 2016 WL 4184296, at *14. To the extent Plaintiffs seek to allege that CKI or Defendants did not actually hold the stated belief about future KRW/USD exchange rate movements, that allegation is entirely conclusory. (Compl. ¶¶ 65, 99, 341, 668, 682, 748, 815.) Plaintiffs have alleged no facts showing that CKI or Defendants did not hold this opinion regarding the future movement of the exchange rate at the time CKI allegedly stated it to Plaintiffs.

Similarly, Plaintiffs' multiple allegations that CKI misrepresented the KIKOs as "zero cost" (*id.* ¶¶ 313, 649-53, 697, 762, 835, 893) and "government sponsored" (*id.* ¶¶ 188, 339, 517, 622, 624, 628, 700), cannot save their fraud claims because that is tantamount to stating that Plaintiffs believed that the KIKOs were free and had no risk. Such a position is, again, patently unreasonable. *See Simmtech*, 2016 WL4184296, at *14 (addressing the "zero cost" allegations and holding that Simmtech's claims were "patently unreasonable" because Simmtech "could not have justifiably believed that [the KIKOs] would miraculously be free.")

In any event, neither the "zero cost" nor "government sponsored" theories of fraud are actionable because Plaintiffs do not plead any facts showing that these alleged false statements proximately led to their loss. To adequately plead a fraud claim, a plaintiff must plead facts showing both transaction and loss causation. *See Lamb v. Faessel*, 745 N.Y.S.2d 534, 536 (1st Dep't 2002). To show transaction causation, a plaintiff need only plead facts showing that "defendant's misrepresentation induced plaintiff to engage in the transaction in question." *Id.* But to plead loss causation a plaintiff must plead facts showing "that the misrepresentations directly caused the loss about which plaintiff complains." *Id.* "Loss causation is the fundamental core of the common-law concept of proximate cause." *Id.* Plaintiffs simply have not alleged the necessary connection between the alleged misrepresentation that the KIKOs were "zero cost" or "government sponsored" and the financial losses that they incurred from the transactions. Indeed, Plaintiffs admitted that it was unfavorable fluctuations in the USD/KRW currency rates that caused their financial losses, (*e.g.*, Compl. ¶¶ 865-66 ("The American financial crisis especially hit foreign exports that relied on American purchases for their income. This triggered a decline in value of currencies in nations such as South Korea that relied heavily on exports to the U.S. But it also, and more immediately, led to a decline in South Korean exports to the U.S.")).

c. The Aiding and Abetting and Conspiracy Claims Relating to the KIKO Fraud Claims Fail for Additional Reasons

First, Plaintiffs' failure to plead adequately their claims for fraud is fatal to their claims for conspiracy to commit fraud and aiding and abetting fraud (Counts 3-4, 20-21, 37-38, 54-55, 71-72, and 88-89), each of which requires an actionable underlying claim of fraud. *See Eaves*, 785 F. Supp. 2d at 246. In any event, as discussed above (*see* Section III.A.4, *supra*), the Complaint fails to plead with particularity that Defendants had actual knowledge of CKI's alleged wrongdoing, which is required for an aiding and abetting claim. *See Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292-93 (2d Cir. 2006) (plaintiff must plead that the defendant had ***actual knowledge*** of the fraud, and must plead such actual knowledge with particularity). Similarly, as discussed above in Section III.A.3, the Complaint does not include any specific allegations regarding conduct of any employee or agent of the Defendants in the alleged wrongdoing, requiring dismissal of the conspiracy claim. *Am. Med. Ass'n*, 588 F. Supp. 2d at 446.

2. Plaintiffs' Risk Transfer Fraud Claims Fail to State a Claim

Plaintiffs base the Risk Transfer Fraud Claims on the theory that they would not have entered into the KIKOs if they had known of the "mirror image" transactions that shifted risk from CKI to Citibank. (Compl. ¶¶ 1131, 1144, 1357, 1370, 1581, 1584, 1803, 1816, 2028, 2041, 2251, 2264.) But Plaintiffs only complain that these transactions allegedly "created a conflict of interest that would not have existed if CKI had had reverse transactions with a non-Citi entity . . . ." (Compl. ¶¶ 1128, 1354, 1578, 1800, 2025, 2248.) In other words, Plaintiffs admit that they still would have entered into the KIKOs if CKI had entered into the same risk transfer trades with a third-party. Nothing about these alleged risk transfer trades changed the economics of the KIKOs. As the *Simmtech* court reasoned:

> Plaintiff has failed to allege that the fact that Citibank N.A. was the entity with which CKI made its reverse transactions was a material omission. There is no question that by entering into the KIKO transaction with CKI, Simmtech knew that CKI was taking the opposite bet that Simmtech was taking. . . . Nowhere in the [complaint] has Simmtech explained why the fact of CKI's transferring of its profits to a parent company versus another entity would make any difference to Simmtech. The claim is simply implausible and does not meet the *Twombly/Iqbal* standard for surviving a motion to dismiss.

Simmtech, 2016 WL 4184296, at *15 (internal citations omitted).

Moreover, these allegations, at most, show nothing more than transaction causation, i.e., but-for causation. Plaintiffs have not alleged facts showing that these "reverse transactions" caused them to suffer losses in any way, and indeed, it is difficult to see how that would even be possible since the reverse transactions had no effect on the KIKO trades themselves. *Lamb*, 745 N.Y.S.2d at 536.

3. Plaintiffs' WM/R Fraud Claims Fail to State a Claim

The WM/R Fraud Claims are largely grounded on an order of the U.S. Commodity Futures Trading Commission ("CFTC"), dated November 11, 2014 (the "CFTC Order"). (Compl. ¶ 595; Kaplan Decl. Ex. 12.) The CFTC Order alleges that from ***2009*** through 2012, certain Citibank FX traders attempted to manipulate certain FX benchmark rates. (Kaplan Decl. Ex. 12 at 2.)[28] The underlying premise of the CFTC Order is that "[i]n ***late 2008***, following the financial crisis, liquidity and volume in the FX market increased," and this "increase in volume and liquidity allowed Citibank FX traders and traders at other banks to take advantage of this trading opportunity." (*Id.* at 5.) CKI and Plaintiffs, however, entered into the first KIKOs between ***2004 and August 2007***, and entered into the last KIKOs between ***November 2007 and March 2008***. (Compl. ¶¶ 631-33, 669, 702-04, 726, 773, 786-87, 844, 862, 875, 916, 944, 960.) Plainly, neither CKI nor the Defendants had any duty in 2004 through March 2008 to disclose the subject matter addressed in the CFTC Order, which is alleged to have first occurred in "late 2008" at the earliest. (Kaplan Decl. Ex. 12 at 5.) The *Simmtech* court previously employed this same reasoning when it rejected Simmtech's similar WM/Reuters Rate fraud claims. *Simmtech*, 2016 WL 4184296, at *14 (finding "no basis for reliance or loss causation resulting from any alleged exchange rate manipulation" because the alleged manipulation occurred after the plaintiff purchased the KIKO products).

Finding no direct support for their WM/R Fraud Claims in the CFTC Order,

[28] Citibank did not admit any of the findings in the CFTC Order. (Kaplan Decl. Ex. 12 at 1, 11.)

Plaintiffs make the conclusory allegation that the attempted manipulation (the CFTC Order does not allege actual manipulation) that the CFTC ties to the late-2008 financial crisis, actually began four years earlier in 2004, and affected the KRW/USD exchange rate. (Compl. ¶¶ 599-600.) Plaintiffs allege no additional facts to support this naked assertion, which is entitled to no weight. *See Iqbal*, 556 U.S. at 678; *Simmtech*, 2016 WL 4184296, at *14 (finding that plaintiff failed to provide "any explanation for the discrepancy between the '2004' assertion and the CFTC Order itself"). Therefore, Plaintiffs have failed to plead a misrepresentation or omission, which is fatal to their WM/R Fraud Claims. *See Emergent*, 343 F.3d at 197.

Even assuming that Plaintiffs' unsupported, conclusory allegation that Citibank's FX traders did manipulate the USD/KRW exchange rate is true, there is no allegation that the "manipulation" went against Plaintiffs, and just as easily could have gone in their favor. Thus, Plaintiffs' allegations are, at best, "consistent" with a theory of recovery, *see Twombly*, 550 U.S. at 557, and do not satisfy *Iqbal*'s plausibility standard. *See Iqbal*, 556 U.S. at 678. And, for the same reason, Plaintiffs have failed to plead any facts showing loss causation. Plaintiffs do not allege any particular instance of manipulation of the USD/KRW exchange rate, and do not allege whether any alleged manipulations in the foreign exchange rates caused the price of KRW to rise or fall. Put simply, there are no facts showing that any alleged manipulation of the USD/KRW exchange rate harmed any Plaintiff.

D. The Court Should Dismiss the Unjust Enrichment and Rescission Claims

1. Plaintiffs' Unjust Enrichment/Restitution Claims Fail

Plaintiffs assert claims for "unjust enrichment/restitution."[29] To successfully plead an unjust enrichment claim, a plaintiff must plead facts showing that a "(1) defendant was

[29] Restitution is the remedy for unjust enrichment, not a separate basis for liability. *N.Y. v. SCA Servs., Inc.*, 761 F. Supp. 14, 15 (S.D.N.Y. 1991); S*umitomo Corp. v. Chase Manhattan Bank*, 2000 WL 1616960, at *3 (S.D.N.Y. Oct. 30, 2000).

enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendants to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). To the extent Plaintiffs assert unjust enrichment claims, they have failed to allege facts supporting those claims.

In the *Simmtech* opinion, Judge Forrest reasoned that:

> "[p]laintiff's basis for asserting unjust enrichment is that Citibank N.A. was enriched by entering into reverse payment transactions with CKI. However, there is no plausible allegation that the fact of the reverse payment transaction was what enriched Citibank N.A. at plaintiff's expense . . . any moves in the KRW / USD market at plaintiff's expense would have benefitted CKI. That CKI transferred any gains to Citibank N.A. is not in itself a basis for 'unjustly enriching' Citibank N.A. Plaintiff has in essence failed to allege why the profit-sweeping setup between CKI and Citibank N.A. is of any consequence. Indeed, plaintiff has acknowledged that if CKI had entered into reverse transactions with a non-Citi entity, that fact would not have been material to its decision to enter the KIKO transaction." *Id.* at *16 (internal citations omitted).

Here too, Plaintiffs admit that if CKI had entered into reverse transactions with a non-Citi entity, those arrangements would not have materially affected their decisions to enter the KIKO transactions with CKI. (Compl. ¶¶ 1128, 1354, 1578, 1800, 2025, 2248.)

Furthermore, unjust enrichment is a quasi-contract theory of recovery, and a plaintiff cannot recover where a valid and enforceable contract governs the subject matter of the claim. *Payday Advance Plus, Inc. v. Findwhat.com, Inc.*, 478 F. Supp. 2d 496, 504 (S.D.N.Y. 2007). Here, the KIKOs are valid and enforceable contracts that govern the subject matter of Plaintiffs' unjust enrichment claims. (*See* Compl. ¶¶ 1118, 1344, 1568, 1790, 2015, 2238.) It is no answer for Plaintiffs to argue that none of the Defendants was party to the KIKOs, because "[t]he rule that an unjust enrichment claim does not lie where a valid, enforceable written contract governs the same subject matter extends to cases where one of the parties [to the litigation] was not a party to the contract." *Payday*, 478 F. Supp. 2d at 504-05.[30]

2. The Court Should Dismiss Plaintiffs' Rescission/Disgorgement Claims

Plaintiffs' "causes of action" for rescission and disgorgement should be dismissed based on procedural and substantive pleading defects. With respect to the procedural pleading defects, rescission and disgorgement are equitable remedies that may be imposed only once liability is established. *S.E.C. v. Boock*, 2011 WL 3792819, at *24 (S.D.N.Y. Aug. 25, 2011); *see also Teachers Ins. & Annuity Ass'n of Am. v. CRIIMI MAE Servs. Ltd. P'ship*, 681 F. Supp. 2d 501, 512 n.60 (S.D.N.Y. 2010) ("[d]isgorgement is merely an equitable remedy rather than a cause of action."), *aff'd*, 481 F. App'x 686 (2d Cir. 2012); *Girl Friends Prods., Inc. v. ABC, Inc.*, 2000 WL 1505978, at *5 n.3 (S.D.N.Y. Oct. 10, 2000) ("Although plaintiffs also allege a separate claim of 'rescission' . . . rescission is simply an equitable remedy that might be available if a claim for legal liability were established."), *aff'd*, 20 F. App'x 75 (2d Cir. 2001). In addition, there is no reason for this Court to grant an equitable remedy when Plaintiffs already have sought relief in the Korean courts based on the transactions at issue and lost on their claims.

Plaintiffs' rescission/disgorgement claims also suffer the same infirmities fatal to the *Simmtech* plaintiff's claims. In *Simmtech*, the plaintiff, as here, alleged that the KIKOs were unenforceable because the KIKO contracts were "unconscionable," plaintiff required protection by the "doctrine of unilateral mistake," and that defendants "breached the implied covenant of good faith and fair dealing." *Simmtech*, 2016 WL 4184296, at *16. The Court rejected these allegations as "threadbare recitations" that were "wholly unsupported by factual basis" such that they failed the *Twombly/Iqbal* pleading standard. *Id.* Plaintiffs' Complaint contains precisely

[30] Finally, a plaintiff cannot recover on an unjust enrichment theory where its relationship with the defendant is too attenuated. *Georgia Malone & Co. v. Rieder*, 973 N.E.2d 743, 746-47 (N.Y. 2012). Here, the relationships between Plaintiffs and Defendants are non-existent "because they simply had no dealings with each other." *Georgia Malone*, 973 N.E.2d at 747; *see also Grynberg v. ENI S.P.A.*, 503 F. App'x 42, 43-44 (2d Cir. 2012).

the same defective allegations (Compl. ¶¶ 1121-23, 1347-49, 1571-73, 1793-95, 2018-20, 2241-43) that should likewise be rejected by this Court.

E. Plaintiffs Fail to Allege Facts Supporting An Agency Theory of Liability

As discussed above, Plaintiffs have not sufficiently pleaded primary liability against any Defendant. But even if the Complaint's allegations did state a claim for relief—and they do not—that claim would be against CKI and not against Defendants. Regardless of whether the claim sounds in fraud, breach of fiduciary duty, negligence, or otherwise, the facts pleaded show that there was no relationship between any of the six Plaintiffs and any Defendant or that Defendants even were aware of Plaintiffs' existence. And Plaintiffs' attempt to cast Defendants as the agent of CKI with respect to the KIKO trades fails because, despite each Plaintiff having the benefit of a full trial on the merits of their claims in Korea, Plaintiffs have not alleged facts showing the existence of an agency relationship between CKI and Defendants with respect to the KIKO transactions challenged in this action.[31]

An agency relationship requires a showing that the putative principal controls the putative agent with respect to the transaction at issue. *Manchester Equip. Co. v. Am. Way & Moving Co.*, 60 F. Supp. 2d 3, 7 (E.D.N.Y. 1999). The Complaint devotes 30 paragraphs to attempting to allege that CKI functioned as Defendants' agent with respect to the KIKOs. (Compl. ¶¶ 539-58, 564-73.) That section (as well as the rest of the Complaint), however, does not allege facts showing that Defendants controlled CKI with respect to the transactions at issue in this litigation. For example, the naked assertion that unspecified "Defendants permitted, actively encouraged, and directly participated in [*sic*] sale of the KIKOs as a hedge to Plaintiffs" (*id.* ¶ 553) contains no facts, and actually contradicts numerous facts alleged in the Complaint

[31] The Complaint also alleges that Defendants are liable for CKI's conduct under the doctrine of *respondeat superior*. (Compl. ¶ 2.) But *respondeat superior* does not apply in the parent-subsidiary context. *Abdelhamid v. Altria Grp., Inc.*, 515 F. Supp. 2d 384, 394 (S.D.N.Y. 2007).

claiming that CKI and its personnel functioned independently of Defendants with respect to these KIKO trades. (*See, e.g.*, Compl. ¶¶ 627-28, 637, 696, 700, 718, 774, 780, 816, 840, 858, 862, 893, 898, 940, 962.) This failure to allege facts showing that Defendants controlled CKI with respect to the KIKOs is fatal to Plaintiffs' agency theory of liability. *See Maung Ng We v. Merrill Lynch & Co.*, 2000 WL 1159835, at *7 (S.D.N.Y. Aug. 15, 2000) ("The essence of control in an agency sense is in the *necessity* of the consent of the principal on a given matter. Otherwise, if the subsidiary has discretion to act, the parent cannot justifiably be said to have the essential right of control over its subsidiary's actions."). In essence, Plaintiffs have alleged nothing more than that CKI is an affiliate of Defendants. But "the mere fact that there exists a parent-subsidiary relationship between two corporations" does not "make the one liable for the torts of its affiliate." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998).[32]

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint with prejudice.

[32] Finally, Korea provides a better forum in which to adjudicate these claims. Plaintiffs' Complaint, like the complaint in the *Simmtech* action, asserts claims arising from Korean transactions between Korean entities negotiated and performed in Korea and which were the subject of Korean litigations. For that reason, the *Simmtech* court originally dismissed the *Simmtech* action on *forum non conveniens* grounds. *Simmtech Co. v. Citibank, N.A.*, 2015 WL 542284 (S.D.N.Y. Feb. 10, 2015). In a non-precedential Summary Order, the Second Circuit vacated that dismissal. According to that Summary Order, Simmtech's complaint alleged "a multitude of contacts with New York that indicate a strong likelihood that witnesses and evidence are most conveniently produced in plaintiff's chosen forum." *Simmtech Co. v. Citibank, N.A.*, 634 F. App'x 63, 64 (2d Cir. 2016). Those same types of allegations are not present here. If some or all of the claims asserted herein move past the pleading stage, Defendants reserve the right to seek a *forum non conveniens* dismissal, once the scope of what is at issue has been determined. *See Jacobs v. Felix Block Erben Verlag Fur Buhne Film Und Funk KG*, 160 F. Supp. 2d. 722, 742 (S.D.N.Y. 2001) ("the caselaw seems to be clear that forum non conveniens motions are not governed by the same time constraints imposed by Rule 12(h) of the Federal Rules of Civil Procedure on personal jurisdiction and venue motions").

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Respectfully submitted,

MILBANK TWEED HADLEY & McCLOY LLP

By: */s/ Daniel M. Perry*

Scott A. Edelman (SE 5247)
(sedelman@milbank.com)
Daniel M. Perry (DP 6966)
(dperry@milbank.com)
Jed M. Schwartz (JS 6184)
(jschwartz@milbank.com)
Taryn J. Gallup (TG 3200)
(tgallup@milbank.com)
Daniel B. Kaplan (DK 6363)
(dkaplan@milbank.com)

28 Liberty Street
New York, New York 10005-1413
Phone: (212) 530-5000
Fax: (212) 530-5219

Attorneys for Defendants

APPENDIX A

GROUNDS FOR DISMISSAL

	New York Statute of Limitations	Korea Tort Limitations Period	Korea Unjust Enrichment Limitations Period	Comity, *Res Judicata*, and Collateral Estoppel	Failure to State a Claim (Fed. R. Civ. P. 12(b)(6))
KIKO Fraud Claims (Counts 1-4, 18-21, 35-38, 52-55, 69-72, 86-89)	✓ Section I.A.4	✓ Section I.B		✓ Section II	✓ Section III.C
Risk Transfer Fraud Claims (Counts 11-13, 28-30, 45-47, 62-64, 79-81, 96-98)	✓ Section I.A.4	✓ Section I.B		✓ Section II	✓ Section III.C.2
WM/R Fraud Claims (Counts 14-17, 31-34, 48-51, 65-68, 82-85, 99-102)	✓ Section I.A.4			✓ Section II	✓ Section III.C.3
Negligence (Counts 5, 22, 39, 56, 73, 90)	✓ Section I.A.1	✓ Section I.B		✓ Section II	✓ Section III.B
Fiduciary Duty Claims (Counts 6-8, 23-25, 40-42, 57-59, 74-76, 91-93)	✓ Section I.A.2	✓ Section I.B		✓ Section II	✓ Section III.A
Unjust Enrichment / Restitution (Counts 9, 26, 43, 60, 77, 94)	✓ Section I.A.3		✓ Section I.C	✓ Section II	✓ Section III.D.1
Rescission / Disgorgement (Counts 10, 27, 44, 61, 78, 95	✓ Section I.A.3			✓ Section II	✓ Section III.D.2